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## The "Time of Arrest" Rule: How the Washington State Supreme Court Untethered Its Search Incident to Arrest Jurisprudence from the Exception's Underlying Rationales

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# THE “TIME OF ARREST” RULE: HOW THE WASHINGTON STATE SUPREME COURT UNTETHERED ITS SEARCH INCIDENT TO ARREST JURISPRUDENCE FROM THE EXCEPTION’S UNDERLYING RATIONALES

Laura Zanzig-Wong\*

*Abstract:* The search incident to arrest exception is based on two exigencies: officer safety and evidence preservation. In searches incident to arrest of an arrestee’s person, these exigencies are presumed. Recently, the Washington State Supreme Court extended this presumption to all items carried by an arrestee at the time of arrest, regardless of whether the arrestee can access such items at the time of the search. I argue that this extension untethers the search incident to arrest doctrine from its underlying rationales and focuses too heavily on the practical issue of transporting an arrestee’s belongings to the station post-arrest. In doing so, the Court fails to uphold the Fourth Amendment and the more robust protection of individual rights offered by article I, section 7 of the Washington Constitution. Going forward, the Court should realign its search incident to arrest jurisprudence with the exception’s established justifications so that the constitutional rights of Washingtonians are properly protected.

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## BACKGROUND

### A. *Search Incident to Arrest: Federal Law*

The Fourth Amendment establishes the “right of the people . . . against unreasonable searches and seizures.”<sup>1</sup> Warrantless searches are “*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”<sup>2</sup> These exceptions are justified by the “exigencies of the situation.”<sup>3</sup> One warrant exception is the search incident to a lawful arrest.<sup>4</sup> This exception “has always been considered to be a strictly limited right,” and, like all warrant exceptions, “grows out of the inherent necessities of the situation at the time of the arrest.”<sup>5</sup>

As the United States Supreme Court explained in *Chimel v. California*,<sup>6</sup> the search incident to arrest exception is justified by the potential for an arrestee to endanger an officer or destroy evidence:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.<sup>7</sup>

These concerns also justify a search of the area within the arrestee’s immediate control, meaning the area “from within which [an arrestee] might gain possession of a weapon or destructible evidence.”<sup>8</sup> In *Chimel*, officers arrested the defendant in his home and searched the entire house

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1. U.S. CONST. amend. IV.

2. *Katz v. United States*, 389 U.S. 347, 357 (1967) (emphasis in original) (footnote omitted).

3. *McDonald v. United States*, 335 U.S. 451, 456 (1948).

4. *See Weeks v. United States*, 232 U.S. 383, 392 (1914).

5. *Trupiano v. United States*, 334 U.S. 699, 708 (1948), *overruled on other grounds by* *United States v. Rabinowitz*, 339 U.S. 56 (1950).

6. 395 U.S. 752 (1969), *abrogated on other grounds by* *Davis v. United States*, 564 U.S. 229 (2011).

7. *Chimel*, 395 U.S. at 762–63.

8. *Id.* at 763.

on the basis of that arrest.<sup>9</sup> The Court found that the rationales of officer safety and evidence preservation did not justify “routinely searching any room other than that in which an arrest occurs—or, for that matter, . . . searching through all the desk drawers or other closed or concealed areas in that room itself.”<sup>10</sup> Thus, to the extent the officers searched beyond the area of the defendant’s immediate control, the search was unconstitutional.<sup>11</sup>

Although searches incident to arrest are based upon the need to disarm and discover evidence, searches of an arrestee’s person are permissible regardless of the probability that weapons or evidence will in fact be found during a particular arrest.<sup>12</sup> As set forth in *United States v. Robinson*,<sup>13</sup> the legality of the arrest establishes the authority to search.<sup>14</sup> This is because “the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests.”<sup>15</sup> In other words, *Robinson* established a categorical approach to reviewing searches of an arrestee’s person, which presumes the *Chimel* rationales exist during every arrest.<sup>16</sup> Thus, if an arrest is lawful, a search of the arrestee’s person incident to that arrest requires no additional justification.<sup>17</sup> Applying this categorical approach, the *Robinson* Court upheld the search of a cigarette package found in the arrestee’s pocket.<sup>18</sup>

*Robinson* did not define the scope of an arrestee’s person and it is the only Supreme Court decision applying *Chimel* to a search of the contents of an item found on an arrestee’s person.<sup>19</sup> Lower courts have treated small items on the arrestee’s person—namely, a wallet,<sup>20</sup> a billfold,<sup>21</sup> and a purse<sup>22</sup>—as part of his or her person for the purposes of the search incident to arrest. For example, in *United States v. Watson*,<sup>23</sup> officers

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9. *Id.* at 753–54.

10. *Id.* at 763.

11. *Id.*

12. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

13. 414 U.S. 218.

14. *Id.* at 235.

15. *Riley v. California*, 573 U.S. \_\_\_, 134 S. Ct. 2473, 2484–85 (2014).

16. *Robinson*, 414 U.S. at 235.

17. *Id.*

18. *Id.* at 218.

19. *Riley*, 134 S. Ct. at 2488.

20. *United States v. Watson*, 669 F.2d 1374, 1383–84 (11th Cir. 1982).

21. *United States v. Carrion*, 809 F.2d 1120, 1123, 1128 (5th Cir. 1987).

22. *United States v. Lee*, 501 F.2d 890, 892 (D.C. Cir. 1974).

23. 669 F.2d 1374 (11th Cir. 1982).

searched the arrestee and removed his wallet.<sup>24</sup> The defendant argued that the police needed a warrant to search the wallet because it was under their exclusive control—and thus inaccessible to the defendant.<sup>25</sup> Citing *Robinson* and *Chimel*, the court held that a warrant was unnecessary because the wallet was taken from the defendant's person during a search incident to arrest.<sup>26</sup> Likewise, in *United States v. Carrion*,<sup>27</sup> the officers removed a billfold and an address book from the defendant's pocket and searched them.<sup>28</sup> The Fifth Circuit concluded that this was a valid search of his person.<sup>29</sup> In *United States v. Lee*,<sup>30</sup> at the "point of arrest," an officer saw the defendant attempt to put drug paraphernalia in her purse.<sup>31</sup> He searched the purse and found more paraphernalia inside.<sup>32</sup> Without further analysis, the court concluded that the officer's view of the paraphernalia in the arrestee's hand "supplied probable cause for her arrest and the search of her purse incident thereto."<sup>33</sup>

However, *Robinson*'s categorical approach is not limitless; there must still be some threat to officer safety or evidence preservation. For example, in *United States v. Chadwick*,<sup>34</sup> the Court held that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest' or no exigency exists."<sup>35</sup> In *Chadwick*, the defendants were arrested right after they lifted a footlocker into the trunk of their car.<sup>36</sup> The footlocker was seized and,

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24. *Id.* at 1383.

25. *Id.* at 1383–84.

26. *Id.* at 1384.

27. 809 F.2d 1120 (5th Cir. 1987).

28. *Id.* at 1123.

29. *Id.* at 1128.

30. 501 F.2d 890 (D.C. Cir. 1974).

31. *Id.* at 891.

32. *Id.*

33. *Id.* at 892 (internal citations omitted).

34. 433 U.S. 1 (1977), *abrogated on other grounds by* California v. Acevedo, 500 U.S. 565 (1991).

35. *Chadwick*, 433 U.S. at 15 (internal citation omitted) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). *Chadwick* has been criticized for contributing to confusion about whether officers must have probable cause to conduct a warrantless search of a container in a car. *See Acevedo*, 500 U.S. at 568. This particular issue goes beyond the scope of this Article, so I do not further address that criticism. Rather, I cite to *Chadwick* for its discussion of items in the exclusive control of law enforcement officers and the resulting lack of exigency.

36. *Id.* at 4.

for the next ninety minutes, remained under law enforcement’s exclusive control at all times.<sup>37</sup> Officers then searched the footlocker without the arrestee’s consent and without a warrant.<sup>38</sup> Citing *Robinson*, the *Chadwick* Court acknowledged that the “potential dangers lurking in all custodial arrests make warrantless searches of items within the ‘immediate control’ area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved.”<sup>39</sup> However, the Court continued:

Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.<sup>40</sup>

Similarly, in *Arizona v. Gant*,<sup>41</sup> the United States Supreme Court made clear that police may search vehicles incident to arrest only if the arrestee can reach the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the crime of arrest.<sup>42</sup> This rule “ensure[s] that officers may search a vehicle when genuine safety or evidentiary concerns . . . justify a search.”<sup>43</sup> *Gant*’s holding resolved a conflict in the lower courts over whether a vehicle could be searched incident to arrest even if the arrestee could not gain access to the vehicle at the time of the search.<sup>44</sup> The *Gant* Court concluded that allowing such searches would “untether the rule from the justifications underlying the *Chimel* exception.”<sup>45</sup> Thus, in the context of vehicle searches incident to arrest, the *Chimel* rationales are not presumed.

Recently, in *Riley v. California*,<sup>46</sup> the United States Supreme Court declined to extend the categorical rule from *Robinson* to digital items, such as cell phones, found on an arrestee’s person.<sup>47</sup> The Court reasoned

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37. *Id.*

38. *Id.*

39. *Id.* at 14–15.

40. *Id.* at 15.

41. 556 U.S. 332 (2009).

42. *Id.* at 351.

43. *Id.* at 347.

44. *Id.* at 341.

45. *Id.* at 343.

46. 573 U.S. \_\_\_, 134 S. Ct. 2473 (2014).

47. *Id.* at 2485.

that *Robinson* struck the appropriate balance between governmental interests and individual privacy in the context of physical objects.<sup>48</sup> However, with respect to digital content, the Court found no comparable risk of officer harm or evidence destruction, as well as an enhanced privacy interest in the information contained in digital items.<sup>49</sup> The *Riley* Court concluded that “officers must generally secure a warrant before conducting such a search.”<sup>50</sup> *Riley* suggests that “a lawful arrest no longer provides categorical justification to search, without a warrant, all items found on an arrested person at the time of arrest.”<sup>51</sup> However, the precise scope of the categorical approach remains unclear.<sup>52</sup>

### *B. Search Incident to Arrest: Washington Law*

As the Washington State Supreme Court has frequently recognized, “[o]ur state constitution provides greater protection to individuals from warrantless searches and seizures than does the United States Constitution.”<sup>53</sup> This greater protection comes from article I, section 7 of the Washington Constitution, which states: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>54</sup> While the Fourth Amendment precludes only “unreasonable” searches and seizures,<sup>55</sup> article I, section 7 prohibits “any disturbance of an individual’s private affairs ‘without authority of law.’”<sup>56</sup> Under Washington law, a warrantless search is “per se unreasonable and its fruits will be suppressed unless it falls within one of the carefully drawn

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48. *Id.* at 2484.

49. *Id.* at 2484–85; *see also id.* at 2489 (“A conclusion that inspecting the contents of an arrestee’s pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.”).

50. *Id.* at 2485.

51. *State v. VanNess*, 186 Wash. App. 148, 160, 344 P.3d 713, 719 (2015).

52. *Cf. Riley*, 134 S. Ct. at 2488 (“*Robinson* is the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee’s person.”).

53. *State v. Ortega*, 177 Wash. 2d 116, 122, 297 P.3d 57, 60 (2013); *see also State v. Jackson*, 150 Wash. 2d 251, 259, 264, 76 P.3d 217, 222, 224 (2003) (GPS monitoring); *State v. Boland*, 115 Wash. 2d 571, 575, 578, 800 P.2d 1112, 1114, 1116 (1990) (trash searches); *City of Seattle v. Mesiani*, 110 Wash. 2d 454, 456, 458, 755 P.2d 775, 776, 778 (1988) (DUI searches); *State v. Gunwall*, 106 Wash. 2d 54, 64, 68, 720 P.2d 808, 813–14, 816 (1986) (phone records).

54. U.S. CONST. art. I, § 7.

55. U.S. CONST. amend. IV.

56. *State v. Valdez*, 167 Wash. 2d 761, 772, 224 P.3d 751, 756 (2009) (quoting *York v. Wahkiakum Sch. Dist.*, 163 Wash. 2d 297, 305–06, 178 P.3d 995, 1014 (2008)).

and jealously guarded exceptions to the warrant requirement.”<sup>57</sup> “This creates ‘an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions.’”<sup>58</sup>

The article I, section 7 inquiry has two parts: (1) whether the state action disturbs one’s private affairs and (2) whether the intrusion is justified by authority of law.<sup>59</sup> “To determine the existence and scope of the jealously guarded exceptions that provide ‘authority of law’ absent a warrant, [courts] look at the constitutional text, the origins and law at the time our constitution was adopted, and the evolution of that law and its doctrinal development.”<sup>60</sup>

The search incident to arrest exception under article I, section 7—like its sister exception under the Fourth Amendment—is grounded in the rationales of officer safety and evidence preservation.<sup>61</sup> Because the exception is rooted in the lawful authority to take the arrestee into custody, it satisfies article I, section 7’s requirement that intrusions on a person’s privacy be lawful.<sup>62</sup> Searches of an arrestee’s person thus require no additional justification beyond the lawfulness of the arrest.<sup>63</sup>

### C. *The “Time of Arrest” Rule*

The Washington State Supreme Court has held that a search of an arrestee’s person includes “those personal articles in the arrestee’s actual and exclusive possession at or immediately preceding the time of arrest.”<sup>64</sup> This so-called “time of arrest” rule does not extend to articles in an arrestee’s constructive possession,<sup>65</sup> but only to those “immediately associated” with the arrestee “at or immediately preceding” his or her arrest.<sup>66</sup>

In recent years, the Washington State Supreme Court has explored this issue multiple times.<sup>67</sup> First, in *State v. Byrd*,<sup>68</sup> the Court upheld the

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57. *Ortega*, 177 Wash. 2d at 122, 297 P.3d at 60.

58. *Valdez*, 167 Wash. 2d at 772, 224 P.3d at 756 (quoting *State v. Ringer*, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1983)).

59. *York*, 163 Wash. 2d at 306, 178 P.3d at 1001.

60. *Valdez*, 167 Wash. 2d at 773, 224 P.3d at 757.

61. *Id.*

62. *State v. Byrd*, 178 Wash. 2d 611, 618, 310 P.3d 793, 796 (2013).

63. *Id.* at 617–18, 310 P.3d at 796.

64. *Id.* at 623, 310 P.3d at 799.

65. Constructive possession is “[c]ontrol or dominion over a property without actual possession or custody of it.” *Possession*, BLACK’S LAW DICTIONARY (10th ed. 2014).

66. *Byrd*, 178 Wash. 2d at 623, 310 P.3d at 799.

67. *See, e.g., id.*; *State v. Brock*, 184 Wash. 2d 148, 355 P.3d 1118 (2015); *State v. MacDicken*,



search of a purse that was on the defendant's lap at the time of arrest.<sup>69</sup> Before removing Byrd from the car, the officer took the purse and set it on the ground.<sup>70</sup> He then secured Byrd in the patrol car and returned to the purse "moments" later to search it for weapons or contraband.<sup>71</sup> He found methamphetamine inside.<sup>72</sup>

The Washington State Supreme Court upheld the search.<sup>73</sup> It cited to *Robinson* for the principle that "[u]nlike searches of the arrestee's surroundings, searches of the arrestee's person and personal effects do not require 'a case-by-case adjudication' because they always implicate *Chimel* concerns for officer safety and evidence preservation."<sup>74</sup> Reasoning that the purse "left Byrd's hands only after her arrest," the Court concluded that "Byrd's purse was unquestionably an article 'immediately associated' with her person."<sup>75</sup> The Court further noted there was "no 'significant delay between the arrest and the search' that would 'render the search unreasonable.'"<sup>76</sup> Thus, if the officer had probable cause to arrest Byrd, he "had lawful authority to remove her and all articles closely associated with her person from the car, and the search was valid under the Fourth Amendment and article I, section 7."<sup>77</sup>

The Court again addressed the time of arrest rule in *State v. MacDicken*.<sup>78</sup> There, officers arrested the defendant in a parking lot while he was carrying a laptop bag and pushing a rolling duffel bag.<sup>79</sup> They ordered MacDicken to the ground, handcuffed him, and returned him to his feet.<sup>80</sup> As he stood there, still handcuffed, an officer moved

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179 Wash. 2d 936, 319 P.3d 31 (2014).

68. 178 Wash. 2d 611, 310 P.3d 793 (2013).

69. *Id.* at 615, 624, 310 P.3d at 795, 799.

70. *Id.* at 615, 310 P.3d at 795.

71. *Id.*

72. *Id.*

73. *Id.* at 614, 310 P.3d at 794.

74. *Id.* at 618, 310 P.3d at 796 (quoting *United States v. Robinson*, 414 U.S. 218, 253 (1973)).

75. *Id.* at 623, 310 P.3d at 799.

76. *Id.* at 624, 310 P.3d at 799 (quoting *State v. Smith*, 119 Wash. 2d 675, 682, 835 P.2d 1025, 1029 (1992)). In *Smith*, the Court upheld the search of a fanny pack that fell from the defendant's person when the officer arrested him. 119 Wash. 2d at 676–77, 835 P.2d at 1026. The officer placed the defendant in her patrol car where he could not reach the fanny pack. *Id.* at 677, 835 P.2d at 1026. She then searched the fanny pack between nine and seventeen minutes later. *Id.* The Court found that neither the lapse in time nor the lack of access to the bag rendered the search unreasonable. *See id.* at 677–78, 835 P.2d at 1027.

77. *Byrd*, 178 Wash. 2d at 624, 310 P.3d at 799.

78. 179 Wash. 2d 936, 319 P.3d 31 (2014).

79. *Id.* at 939, 319 P.3d at 32.

80. *See id.*

the bags a car’s length away and began to search them.<sup>81</sup> Inside was evidence of a robbery that occurred the night before.<sup>82</sup>

The Court rejected the notion that the car-length distance between MacDicken and the bags affected the search’s validity.<sup>83</sup> Instead, the Court held that “the search of the bags carried by MacDicken at the time of his arrest constituted a search of his person” and thus did not analyze “whether the search was a valid search of the area within MacDicken’s immediate control under *Chimel*.”<sup>84</sup> Because the bags were “in MacDicken’s actual and exclusive possession at the time of his arrest” and “there was no significant delay between the arrest and the search that would render the search unreasonable,” the Court found the search to be constitutional.<sup>85</sup>

Most recently, in *State v. Brock*,<sup>86</sup> the Court upheld the search of a backpack that was seized and separated from the defendant roughly ten minutes prior to arrest.<sup>87</sup> The officer encountered Brock in a park that was closed to the public, giving the officer probable cause to arrest him for trespassing.<sup>88</sup> The officer did not do so, instead separating Brock from his bag and performing a *Terry*<sup>89</sup> stop and frisk of Brock’s person.<sup>90</sup> The officer then secured the backpack in his vehicle twelve to fifteen feet away while continuing to question Brock.<sup>91</sup> Upon determining that Brock had provided false information, the officer placed Brock under arrest.<sup>92</sup> He left Brock standing twelve to fifteen feet away while he searched Brock’s bag for identification.<sup>93</sup> Inside, the officer found what appeared to be marijuana and methamphetamine, along with Brock’s Department of Corrections inmate identification card.<sup>94</sup> The officer handcuffed Brock and placed him in the back of his

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81. *Id.*

82. *Id.* at 938–39, 319 P.3d at 32.

83. *Id.* at 941, 319 P.3d at 33.

84. *Id.*

85. *Id.* at 942, 319 P.3d at 34.

86. 184 Wash. 2d 148, 355 P.3d 1118 (2015).

87. *Id.* at 150–51, 355 P.3d at 1119.

88. *Id.* at 151, 355 P.3d at 1119.

89. *Terry v. Ohio*, 392 U.S. 1 (1968). A “*Terry* stop” is an encounter in which police may “stop and briefly detain a person for investigative purposes.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

90. *Brock*, 184 Wash. 2d at 151, 355 P.3d at 1119.

91. *Id.* at 151–52, 355 P.3d at 1120.

92. *Id.* at 152, 355 P.3d at 1120.

93. *Id.*

94. *Id.*

patrol truck.<sup>95</sup> The officer then ran Brock's real name through the database and discovered that Brock had a felony arrest warrant, meaning the officer "had no choice but to take Brock to jail."<sup>96</sup> Before doing so, the officer searched the remainder of Brock's backpack for safety purposes<sup>97</sup> and discovered evidence of identity theft and more potential narcotics.<sup>98</sup>

The Court upheld the search, relying upon *Byrd* and *Robinson* in doing so.<sup>99</sup> The Court reiterated the holding in *Byrd* that, where an item is part of an arrestee's person, "the officer does not need to articulate any objective safety or evidence preservation concerns before . . . searching the item."<sup>100</sup> The Court also explained that "this 'part of the person' distinction" is justified by "presumptive safety and evidence preservation concerns associated with police taking custody of those personal items immediately associated with the arrestee, which will necessarily travel with the arrestee to jail."<sup>101</sup> The Court continued:

[T]he safety and evidence preservation exigencies that justify this 'time of arrest' distinction stem from the safety concerns associated with the officer having to secure those articles of clothing, purses, backpacks, and even luggage, that will travel with the arrestee into custody. Because those items are part of the person, we recognize the practical reality that the officer seizes those items during the arrest. From that custodial authority flows the officer's authority to search for weapons, contraband, and destructible evidence.<sup>102</sup>

"Put simply," the Court stated, "personal items that will go to jail with the arrestee are considered in the arrestee's 'possession' and are within the scope of the officer's authority to search."<sup>103</sup>

Applying this reasoning to the facts before it, the Court found that, although Brock had been separated from his bag for ten minutes before

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95. *Id.*

96. *Id.*

97. "Officer Olson testified that he did not perform a thorough inventory at that time or catalogue the objects in the backpack. However, Officer Olson also testified that he would be unable to bring an arrestee's personal effects to the jail without searching them for contraband, weapons, or explosives." *State v. Brock (Brock: Division One)*, 182 Wash. App. 680, 684, 330 P.3d 236, 238 (2014), *rev'd, Brock*, 184 Wash. 2d 148, 355 P.3d 1118.

98. *Brock*, 184 Wash. 2d at 152–53, 355 P.3d at 1120.

99. *Id.* at 155, 355 P.3d at 1121.

100. *Id.*

101. *Id.*

102. *Id.* at 156, 355 P.3d at 1122.

103. *Id.* at 158, 355 P.3d at 1123.

he was arrested, “the passage of time prior to the arrest did not render it any less a part of Brock’s arrested person.”<sup>104</sup> This was so, the Court explained, because Brock’s backpack was on his person when “the arrest process” had begun.<sup>105</sup> Given that Brock “wore the backpack at the very moment he was stopped by Officer Olson” and “ha[d] no other place to safely stow it,” “the lapse of time had little practical effect on Brock’s relationship to his backpack.”<sup>106</sup> In sum, the Court held that “when the officer removes the item from the arrestee’s person during a lawful *Terry* stop and the *Terry* stop ripens into a lawful arrest, the passage of time does not negate the authority of law justifying the search incident to arrest.”<sup>107</sup>

## ANALYSIS

I argue that the Washington State Supreme Court’s decisions in *Byrd*, *MacDicken*, and *Brock* overextend *Robinson*’s categorical approach in contradiction to the Fourth Amendment, as well as article I, section 7’s even more jealous protection of warrant exceptions. These cases wrongly treat any item carried by an arrestee as part of the arrestee’s person, even if the arrestee cannot access the item when it is searched. Thus, the risks of officer harm and evidence preservation are not always present and should not be presumed. By so widely applying *Robinson*’s presumption, the Court disregarded the rationales underlying the search incident to arrest doctrine. Moreover, the Court based its ruling in part on the practical issue of transporting an arrestee’s personal items to the station, effectively treating this as a new rationale for the search incident to arrest exception. To curb this infringement on rights, the Court should realign its search incident to arrest jurisprudence with the exception’s underlying exigencies and with the heightened protection offered by article I, section 7.<sup>108</sup>

### A. *The Washington State Supreme Court Failed to Jealously Guard the Search Incident to Arrest Exception as Article I, Section 7 Demands*

In upholding the searches in *Byrd*, *MacDicken*, and *Brock*, the

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104. *Id.* at 159, 355 P.3d at 1123.

105. *Id.*

106. *Id.*

107. *Id.*

108. As will be discussed below, both the United States Supreme Court and the Washington State Supreme Court have made a similar realignment in the past. *See Arizona v. Gant*, 556 U.S. 332, 341–44 (2008); *State v. Valdez*, 167 Wash. 2d 761, 774–77, 224 P.3d 751, 757–60 (2009).

Washington State Supreme Court untethered the search incident to arrest doctrine from its underlying rationales. *Robinson*'s categorical approach is based on the inherent risk posed by the circumstances: unless the arrestee and the items on his or her person are searched, there always exists the risk of officer harm or evidence destruction during the arrest and subsequent transport.<sup>109</sup> These exigencies do not dissipate unless the arrestee is searched and any evidence or weapons are secured.<sup>110</sup>

However, such exigency was not present in *Byrd*, *MacDicken*, or *Brock*. In each of these cases, the arrestee was easily separated from the bag prior to the search, meaning the arrestee *could not access it* and thus no longer posed any threat of officer harm or evidence destruction in connection with the bag.<sup>111</sup> Through these cases, the Court has expanded the scope of the "person of the arrestee"<sup>112</sup> to include items within the "arrestee's actual and exclusive possession"<sup>113</sup> *at the time of arrest*, even if those items are in the exclusive possession of law enforcement—and thus inaccessible to the arrestee—*at the time of the actual search*.<sup>114</sup> More troublingly, in *Brock*, the Court contorted the rule to encompass an item in law enforcement's exclusive possession for several minutes before the arrest even occurred.<sup>115</sup> The *Brock* Court reasoned that "there was no significant delay between the arrest[s] and the search[es] that would render the search[es] unreasonable."<sup>116</sup> But once the defendant could no longer access his bag, any delay was significant because the

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109. See *United States v. Robinson*, 414 U.S. 218, 234–35 (1973).

110. *Id.* As noted above, for the same reason, officers may search—without articulating subjective concerns—the surrounding area where the arrestee could obtain a weapon or destroy evidence. *United States v. Chadwick*, 433 U.S. 1, 14–15 (1977); *Chimel v. California*, 395 U.S. 752, 763 (1969). The Washington State Supreme Court did not treat the items in these cases as objects within the arrestee's immediate control; instead, it categorically treated them as part of the arrestee's person. See *Brock*, 184 Wash. 2d at 155, 355 P.3d at 1121; *State v. MacDicken*, 179 Wash. 2d 936, 941, 319 P.3d 31, 33–34 (2014); *State v. Byrd*, 178 Wash. 2d 611, 623, 310 P.3d 793, 799 (2013). Thus, this Article does not address that concept further.

111. See *Brock*, 184 Wash. 2d at 151–52, 355 P.3d at 1119–20; *MacDicken*, 179 Wash. 2d at 939, 319 P.3d at 32; *Byrd*, 178 Wash. 2d at 615, 310 P.3d at 795.

112. *Robinson*, 414 U.S. at 224.

113. *Byrd*, 178 Wash. 2d at 623, 310 P.3d at 799.

114. See *id.* at 615, 310 P.3d at 795; *Brock*, 184 Wash. 2d at 151–52, 355 P.3d at 1119–20; *MacDicken*, 179 Wash. 2d at 939, 319 P.3d at 32.

115. *Brock*, 184 Wash. 2d at 151–52, 355 P.3d at 1119.

116. *MacDicken*, 179 Wash. 2d at 942, 319 P.3d at 34; see also *Byrd*, 178 Wash. 2d at 623–24, 310 P.3d at 799 ("[T]here was no significant delay between the arrest[s] and the search[es] that would render the search[es] unreasonable."); *Brock*, 184 Wash. 2d at 159, 355 P.3d at 1123 ("Under these circumstances, the lapse of time had little practical effect on Brock's relationship to his backpack.").

underlying exigencies no longer existed.<sup>117</sup> Under Washington law, the “justifications permitting a warrantless search incident to arrest are not simply products of judicial fancy, but of principled necessity.”<sup>118</sup>

In criticizing this line of cases, I do not mean to suggest that no personal item could ever be searched incident to arrest. *Robinson* itself makes this clear: when the officer in that case “c[a]me upon the crumpled package of cigarettes, he was entitled to inspect it”—meaning open it and examine the contents within.<sup>119</sup> However, I see an important distinction between items like a wallet or billfold in one’s pocket, as in *Watson* and *Carrion*, and items like the purse in *Byrd*,<sup>120</sup> the rolling bag in *MacDicken*, and the backpack in *Brock*. Namely, the latter items are more easily separated from the arrestee without necessitating an immediate search. Indeed, the fact patterns in *Byrd*, *MacDicken*, and *Brock* reflect this practicality.<sup>121</sup> By contrast, the presence and nature of items in one’s pockets are unknown to an officer until that area is searched. In that context, the categorical approach is warranted because the underlying exigencies are actually present until the search is concluded. One could view personal items on a continuum, with one end being the contents of a pocket, as in *Robinson*, and the other being a footlocker, as in *Chadwick*. The footlocker could not be searched once it was separated from the arrestee,<sup>122</sup> while the cigarette wrapper could.<sup>123</sup> The bags in *Byrd*, *MacDicken*, and *Brock* fall somewhere in the middle: they are too big to fit in a pocket, but—with the exception of *Brock*—were physically carried by the arrestees at the time of arrest. Still, these

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117. Cf. *United States v. Chadwick*, 433 U.S. 1, 15 (1977) (“[W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the ‘search is remote in time or place from the arrest’ or no exigency exists.” (emphasis added) (internal citation omitted) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964))), *abrogated on other grounds by* *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Maddox*, 614 F.3d 1046, 1049 (9th Cir. 2010) (“Mere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the delay.”). In *Maddox*, the court found unconstitutional a search of a keychain that was on the arrestee’s person at the time of arrest but not searched until the defendant was handcuffed and secured in the patrol car. 614 F.3d at 1048–49.

118. *State v. Valdez*, 167 Wash. 2d 761, 773, 224 P.3d 751, 757 (2009).

119. *United States v. Robinson*, 414 U.S. 218, 236 (1973).

120. Like in *Byrd*, the *Lee* court treated the defendant’s purse as part of her person. *United States v. Lee*, 501 F.2d 890, 891–92 (D.C. Cir. 1974). However, the *Lee* opinion is of limited usefulness: it is lacking in details as to the nature of the purse, as well as analysis as to why the court treated the purse as part of the arrestee’s person. Moreover, I would argue that, for the reasons articulated in this Article, the *Lee* court reached the wrong conclusion on that issue.

121. See *Brock*, 184 Wash. 2d at 151–52, 355 P.3d at 1119–20; *MacDicken*, 179 Wash. 2d at 939, 319 P.3d at 32; *Byrd*, 178 Wash. 2d at 615, 310 P.3d at 795.

122. *Chadwick*, 433 U.S. at 15.

123. *Robinson*, 414 U.S. at 236.

bags can be easily separated from an arrestee without necessitating an immediate search. For this reason, they should be treated like the footlocker, not the cigarette wrapper.<sup>124</sup> Such treatment is particularly appropriate given the more extensive privacy protections of article I, section 7.<sup>125</sup>

Instead, the Washington State Supreme Court categorically treated the bags as part of the arrestee's person, without further reflection as to whether the same inherent justifications exist in that context.<sup>126</sup> The Court cites *Robinson* as support for its broad statement that officers may search "an arrestee's person *and personal effects*" pursuant to a lawful arrest.<sup>127</sup> But, *Robinson* refers only to the "person of the arrestee."<sup>128</sup> Again, while certain personal effects fall within *Robinson*'s purview, to apply its categorical approach to all personal items—even those inaccessible to the arrestee—is a substantial leap. As Justice Sheryl Gordon McCloud states in her dissent in *MacDicken*, a "court cannot avoid th[e] question [of access] just by labeling the items searched—in this case a shoulder bag and a piece of rolling luggage—'projection[s] of [the arrestee's] person.'"<sup>129</sup>

The question of access is crucial here: in each case, the bag was secured away from the arrestee at the time of the search.<sup>130</sup> Under these circumstances, the bags cannot pose the inherent risks identified in *Robinson*. Instead, as *Chadwick* makes clear, "there [wa]s no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence"—meaning "a search of that property [wa]s no longer an incident of the arrest."<sup>131</sup> Where the justifications for a warrantless search are so quickly eliminated, a warrant should be required.<sup>132</sup> The Washington State Supreme Court held to the contrary,

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124. By making this comparison, I do not necessarily intend to draw a bright line; these distinctions are not crystal clear and each case will likely be fact-specific. Rather, what I recommend is an approach to personal items that relies more heavily on *Chimel* and applies *Robinson* more narrowly, so that these distinctions can be teased out and the rule remains tethered to the rationales.

125. *See* *State v. Valdez*, 167 Wash. 2d 761, 772, 224 P.3d 751, 757 (2009).

126. *See* *Byrd*, 178 Wash. 2d at 617–18, 310 P.3d at 796.

127. *Id.* at 618, 310 P.3d at 796 (emphasis added).

128. *Robinson*, 414 U.S. at 224.

129. *State v. MacDicken*, 179 Wash. 2d 936, 946, 319 P.3d 31, 36 (2014) (Gordon McCloud, J., dissenting) (quoting *MacDicken*, 179 Wash. 2d at 941, 319 P.3d at 34 (majority opinion)).

130. *See* *State v. Brock*, 184 Wash. 2d 148, 151–52, 355 P.3d 1118, 1119–20 (2015); *MacDicken*, 179 Wash. 2d at 939, 319 P.3d at 32; *Byrd*, 178 Wash. 2d at 615, 310 P.3d at 795.

131. *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated on other grounds by* *California v. Acevedo*, 500 U.S. 565 (1991).

132. *See* *State v. Valdez*, 167 Wash. 2d 761, 777, 224 P.3d 751, 759 (2009) ("[W]hen an arrest is

effectively untethering the search incident to arrest exception from the rationales of officer safety and evidence preservation.

*B. The Washington State Supreme Court Effectively Extended the Rationales Underlying the Search Incident to Arrest Exception to Include Post-Arrest Transport of an Arrestee’s Belongings*

Instead of applying the established rationales for warrantless searches incident to arrest, the Court focused on the issue of transporting an arrestee’s personal items to the station post-arrest—an inappropriate consideration in this context.<sup>133</sup> “It is not the place of the judiciary . . . to weigh constitutional liberties against arguments of public interest or state expediency.”<sup>134</sup> Nonetheless, the Court relied on the issue of item transport in upholding the searches in *Byrd*, *MacDicken*, and *Brock*—effectively creating a third rationale for the search incident to arrest exception.

For example, in *Byrd*, the Court reasoned that:

The time of arrest rule reflects the practical reality that a search of the arrestee’s “person” to remove weapons and secure evidence must include more than his literal person . . . . When police take an arrestee into custody, they also take possession of his clothing and personal effects, any of which could contain weapons and evidence.<sup>135</sup>

This principle was relied upon in *MacDicken*<sup>136</sup> and, in *Brock*, extended to an item that was not actually on the defendant’s person at the time of arrest.<sup>137</sup> Specifically, the Court reasoned that the “officer himself removed the backpack from Brock as a part of his investigation. And, having no other place to safely stow it, Brock would have to bring the

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made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained.”).

133. *Cf. Valdez*, 167 Wash. 2d at 776, 224 P.3d at 758 (“The *Stroud* court balanced privacy interests guaranteed under article I, section 7 with concerns for law enforcement ease and expediency . . . . It is not the place of the judiciary, however, to weigh constitutional liberties against arguments of public interest or state expediency.”).

134. *Id.*

135. *Byrd*, 178 Wash. 2d at 621, 310 P.3d at 798.

136. *See State v. MacDicken*, 179 Wash. 2d 936, 941–42, 319 P.3d 31, 33–34 (2014).

137. 184 Wash. 2d 148, 158, 355 P.3d 1118, 1123 (2015) (“[T]he search incident to arrest rule recognizes the practicalities of an officer having to secure and transport personal items as part of the arrestee’s person . . . .”).



backpack along with him into custody.”<sup>138</sup> Thus, because the backpack was on Brock’s person when “the arrest process had begun”—although the likelihood of arrest was still uncertain—the Court found that the search incident to arrest exception applied categorically.<sup>139</sup>

I recognize the practical reality of transporting items and the fact that the transport of items can pose a risk to officer safety and evidence preservation. Indeed, *Robinson* explicitly acknowledges this possibility.<sup>140</sup> However, the weight given to that consideration in *Byrd*, *MacDicken*, and *Brock*—where officer safety and evidence preservation were not actually at issue—elevates the issue of item transport above constitutional rights.

There are available alternatives that address this practical concern without distorting the search incident to arrest doctrine and compromising constitutional rights. First, the officer could get a search warrant.<sup>141</sup> As the Washington State Supreme Court itself has said:

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns . . . , the warrant must be obtained.<sup>142</sup>

In the cases discussed here, though, the searches were not conducted immediately, nor was there any exigency making an immediate search necessary. To permit a warrantless search in these circumstances runs contrary to the Court’s statement that article I, section 7 creates “an almost absolute bar” to warrantless searches.<sup>143</sup> This is not to say that an

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138. *Id.* at 159, 355 P.3d at 1123.

139. *Id.*

140. *United States v. Robinson*, 414 U.S. 218, 234–35 (1973).

141. It may be helpful here to note the distinction between an arrest warrant and a search warrant. While both subject an officer’s probable cause determination to judicial review, they protect different interests. *Steagald v. United States*, 451 U.S. 204, 212–13 (1981). An arrest warrant is obtained upon a showing of probable cause to believe that an individual committed an offense; it thus protects that person from an unreasonable seizure. *Id.* at 213. A search warrant is obtained upon a showing of probable cause to believe that the object of the search is in a particular place; it thus protects an individual from an unreasonable invasion into the privacy of his or her home and possessions. *Id.* An arrest warrant does not establish the lawful authority for a search. *See id.* at 215–16.

142. *State v. Valdez*, 167 Wash. 2d 761, 777, 224 P.3d 751, 759 (2009).

143. *State v. Ringer*, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1983), *overruled in part on other grounds* by *State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986).

officer cannot separate a bag from a defendant, as the officer did in *Brock*.<sup>144</sup> But once that separation occurs, there is no justification for a warrantless search.

Second, if the item must be transported to the station without obtaining a warrant, the officer could conduct an inventory search. In inventory searches, police have discretion to search items brought with an arrestee to jail “so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of . . . criminal activity.”<sup>145</sup> Inventory searches are thus “not investigatory in scope and are not intended to be searches for evidence.”<sup>146</sup> Their purpose is to “protect the [] owner’s property while it is in police custody and control, protect the police from dishonest claims of theft, and protect officers and the community from potentially dangerous situations.”<sup>147</sup> The inventory search exception gives police rather broad power to search personal items. Still, a constitutional inventory search is limited in scope; even if the search follows standard police procedure, its direction and extent must be restricted to the underlying rationales.<sup>148</sup> Practically speaking, an inventory search could be less invasive than a search incident to arrest. For example, the law enforcement agency’s practice could be to simply list “locked box” or “backpack,” without opening such containers. More importantly, because warrant exceptions derive their validity from their underlying exigencies, it is important not to blur the line between two exceptions.<sup>149</sup> Otherwise, the Court risks creating a hybrid exception that is no longer justified by either exception’s rationales. If the police must transport an arrestee’s belongings to the station, the inventory search exception

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144. *Cf. Brock: Division One*, 182 Wash. App. 680, 691, 330 P.3d 236, 241 (2014) (Becker, J., dissenting) (“The officer was entitled to put the backpack out of reach for his own safety while he decided whether or not to make an arrest.”), *rev’d*, *State v. Brock*, 184 Wash. 2d 148, 355 P.3d 1118 (2015).

145. *Colorado v. Bertine*, 479 U.S. 367, 375 (1987).

146. Nicholas B. Stampfli, *After Thirty Years, Is It Time to Change the Vehicle Inventory Search Doctrine?*, 30 SEATTLE U. L. REV. 1031, 1032 (2007). As the author points out, inventory searches are not without their own set of problems. However, that issue is beyond the scope of this Article.

147. *Id.* at 1033.

148. *State v. Houser*, 95 Wash. 2d 143, 154, 622 P.2d 1218, 1225 (1980) (“Not every inventory taken in compliance with police department regulations is lawful and where a search is improper it cannot be legitimized by conducting it pursuant to standard police procedure.”).

149. *See State v. Valdez*, 167 Wash. 2d 761, 773, 224 P.3d 751, 757 (2009) (“These justifications permitting a warrantless search incident to arrest are not simply products of judicial fancy, but of principled necessity.”); *cf. State v. Winterstein*, 167 Wash. 2d 620, 636, 220 P.3d 1226, 1233 (2009) (rejecting the inevitable discovery doctrine “because it is incompatible with the nearly categorical exclusionary rule under article I, section 7”).

adequately addresses that concern. The Court need not encroach on the bounds of the search incident to arrest exception.

Third, if feasible, the officer could give the bag to someone accompanying the arrestee or ask the arrestee if someone is available to come pick up the bag. This is an option in the context of vehicle impoundment in Washington State,<sup>150</sup> and it could work with personal items as well. When determining whether to impound a vehicle, an officer must at least consider alternatives to impoundment, and the reasonableness of impoundment depends on the particular facts of the case.<sup>151</sup> Where the particular facts of an arrest allow, this would be a reasonable alternative to bringing an item along to the jail.

In sum, the Court placed too much emphasis on the issue of transporting items in concluding that the searches were valid. This is an inappropriate consideration in this context.<sup>152</sup> And, as the alternatives above demonstrate, officer safety and evidence preservation can be addressed without granting blanket authority to search personal items without a warrant. It may be the most convenient option for officers. But, as Washington law makes clear, the “search incident to arrest exception, born of the common law, arises from the necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of that exception must be so grounded and so limited.”<sup>153</sup>

The balance between police safety and defendants’ rights is particularly controversial in this day and age.<sup>154</sup> Because of this sensitive

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150. See, e.g., *State v. Coss*, 87 Wash. App. 891, 900, 943 P.2d 1126, 1130 (1997) (impoundment unreasonable because officer did not inquire whether defendant’s passengers could drive car after her arrest); *State v. Hardman*, 17 Wash. App. 910, 914, 567 P.2d 238, 241 (1977) (impoundment unreasonable because officer knew that defendant’s family lived nearby but did not inquire whether someone was available to come pick up the car).

151. *Coss*, 87 Wash. App. at 899–900, 943 P.2d at 1129–30.

152. See *Valdez*, 167 Wash. 2d at 773, 776, 224 P.3d at 757–59; *State v. Brock*, 184 Wash. 2d 148, 161, 355 P.3d 1118, 1124 (2015) (Gordon McCloud, J., dissenting) (reasoning that “[t]he majority’s second argument—that an object always poses a danger when it must be transported to the jail—stems from a misreading of the United States Supreme Court’s decision in *United States v. Edwards* . . . *Edwards* contradicts rather than supports the assertion that it is inherently dangerous to transport items before they are searched” (citation omitted)).

153. *Valdez*, 167 Wash. 2d at 776, 224 P.3d at 758–59.

154. See, e.g., Press Release, U.S. Dep’t of Justice, *Justice Department Releases Investigative Findings on the Seattle Police Department* (Dec. 16, 2011), <https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-seattle-police-department> [<https://perma.cc/YL2C-7FP7>] (finding that the Seattle Police Department “has engaged in a pattern or practice of excessive force that violates the Constitution and federal law”); Kim Bellware, *Blue Lives Matter, Black Lives Matter Clash After Man Fatally Shot by Chicago Police*, HUFFPOST (Nov. 7, 2016, 3:44 PM), [http://www.huffingtonpost.com/entry/mt-greenwood-protest\\_us\\_5820990ee4b0d9ce6fbd4117](http://www.huffingtonpost.com/entry/mt-greenwood-protest_us_5820990ee4b0d9ce6fbd4117);

time, criminal procedure is inarguably a delicate area of law. The Court is tasked with balancing the interests of police safety and intrusions into privacy, and I do not wish to diminish the seriousness of that task.<sup>155</sup> In this context, though, the issue was not truly police safety—more accurately, it was a matter of police convenience. In such circumstances, it is particularly important to carefully consider any intrusions on constitutional rights. If the Court fails to do so, those rights cease to be “jealously guarded.”<sup>156</sup>

*C. The Washington State Supreme Court Should Realign Its Search Incident to Arrest Jurisprudence with the Exception’s Underlying Rationales and the Protections Afforded by the Fourth Amendment and Article I, Section 7*

The Washington State Supreme Court should realign its search incident to arrest jurisprudence with the exigencies justifying the exception. Especially given that article I, section 7 affords even greater privacy protections than the Fourth Amendment,<sup>157</sup> the “time of arrest” rule as it stands today is problematic. To remedy this departure from the exception’s underlying rationales, the Court should more narrowly construe the concept of an arrestee’s person. This includes refining the definition of the “time of arrest” rule so *Robinson*’s categorical approach does not widely apply to all personal items in an arrestee’s possession at the time of arrest. In the context of personal items that are easily separated from the arrestee—as opposed to, for example, items found in the arrestee’s pockets—the Court should ask “whether application of the search incident to arrest doctrine to this particular category of effects would ‘untether the rule from the justifications underlying the *Chimel*

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Mike Carter, *Jail Time for Ex-Tukwila Cop Who Pepper-Sprayed Handcuffed Man in Hospital*, SEATTLE TIMES (Mar. 21, 2017, 9:49 AM), <http://www.seattletimes.com/seattle-news/crime/ex-tukwila-cop-sentenced-to-9-months-for-pepper-spraying-handcuffed-man-in-hospital/>.

155. I would further like to recognize the professionalism exhibited by the officer in *Brock*, whose clear intent was to avoid an arrest if possible. Judge Mary Kay Becker addressed this professionalism in her dissent to *Brock: Division One* and expressed concern that to “hold that the search became invalid because the officer decided to investigate before making an arrest would create an undesirable incentive for hasty arrests.” 182 Wash. App. 680, 691, 330 P.3d 236, 241 (2014) (Becker, J., dissenting), *rev’d*, *Brock*, 184 Wash. 2d 148, 355 P.3d 1118. While this unfortunate result is possible, I submit that it would be less likely to negatively impact defendants than the expansion of the search incident to arrest rule adopted by the Washington State Supreme Court.

156. See *State v. Ortega*, 177 Wash. 2d 116, 122, 297 P.3d 57, 60 (2013).

157. *Id.*

exception.”<sup>158</sup> This would not render all personal items immune from search; rather, it would ensure that *Robinson*’s categorical approach is applied sparsely and that searches are performed pursuant to a warrant or are otherwise justified by the particular circumstances. Much like the United States Supreme Court did in *Gant*, the Washington State Supreme Court would curb the expansion of the search incident to arrest doctrine beyond its rationales.<sup>159</sup>

In fact, the Washington State Supreme Court recently did this in the vehicle search incident to arrest context.<sup>160</sup> In *State v. Valdez*,<sup>161</sup> the Court noted that “the search incident to arrest exception has been stretched beyond [its] underlying justifications, permitting searches beyond what was necessary for officer safety and preservation of the evidence of the crime of arrest.”<sup>162</sup> *Valdez* overruled a previous Washington State Supreme Court decision, *State v. Stroud*,<sup>163</sup> which held that, “[d]uring the arrest process, including the time immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence.”<sup>164</sup> The *Valdez* Court clarified that:

[A]fter an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee’s presence does not justify a warrantless search under the search incident to arrest exception.<sup>165</sup>

The Court limited the exception to circumstances “when that search is

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158. *Riley v. California*, 573 U.S. \_\_\_, 134 S. Ct. 2473, 2485 (2014) (quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009)).

159. In *Gant*, the U.S. Supreme Court did not technically overturn a previous case; rather, it clarified how a previous case, *New York v. Belton*, 453 U.S. 454 (1981), should be read. *See Gant*, 556 U.S. at 341–44. Thus, the *Gant* Court did not have to address the issue of stare decisis. While that would be something the Washington State Supreme Court would have to confront, given the considerations raised in this Article, the current jurisprudence is “incorrect and harmful.” *See In re Stranger Creek & Tributaries in Stevens Cty.*, 77 Wash. 2d 649, 653, 466 P.2d 508, 511 (1970).

160. *See State v. Valdez*, 167 Wash. 2d 761, 774–77, 224 P.3d 751, 757–60 (2009). While it is beyond the scope of this Article, there is another interesting issue at play in this area of law: the privacy interest in one’s personal items, such as purses or backpacks, as compared to the privacy interest in one’s vehicle.

161. 167 Wash. 2d 761, 224 P.3d 751 (2009).

162. *Id.* at 774, 224 P.3d at 757.

163. 106 Wash. 2d 144, 720 P.2d 436 (1986).

164. *Id.* at 152, 720 P.2d at 441.

165. *Valdez*, 167 Wash. 2d at 777, 224 P.3d at 759.

necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.”<sup>166</sup> Although the circumstances of a vehicle search are not identical to the search of personal items like backpacks, both involve belongings that can easily be separated from the arrestee, thus nullifying the underlying rationales before the search is even conducted. Given this similarity, the Court should take the same exigency-focused approach in the personal item context as it did in *Valdez*.

The Washington Court of Appeals did so in a recent search incident to arrest case.<sup>167</sup> In *State v. VanNess*,<sup>168</sup> the court held that the search of a locked box found in a backpack on the defendant’s person was not a valid search incident to arrest.<sup>169</sup> The court reasoned that, “[a]fter *Riley*, a lawful arrest no longer provides categorical justification to search, without a warrant, all items found on an arrested person at the time of arrest.”<sup>170</sup> Accordingly, the court applied the *Chimel* test and considered whether the underlying justifications were present.<sup>171</sup> Because VanNess was handcuffed, his backpack was on the opposite side of the patrol car, and the box was still locked, he “no longer had access to the contents of his backpack” and could not have harmed an officer or destroyed any evidence.<sup>172</sup> Under those circumstances, the officer could not perform a warrantless search.<sup>173</sup> Although the items in *Byrd*, *MacDicken*, and *Brock* were unlocked, the reasoning still applies: simply because something is on an arrestee’s person at the time of arrest does not mean it inherently threatens officer safety or evidence preservation.

Cases like *Brock* demonstrate “the danger of wandering from the narrow principled justifications of the [search incident to arrest] exception.”<sup>174</sup> If those justifications are disregarded, the exception becomes untethered from its rationales—or, as discussed above, new rationales are created. Justice Gordon McCloud raised a similar concern

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166. *Id.* Consistent with article I, section 7’s heightened protections, *Valdez* goes a step further than *Gant*, which allows a search of the vehicle if it is reasonable to believe that evidence of the crime of the arrest is inside, even if the arrestee cannot reach the passenger compartment. *Arizona v. Gant*, 556 U.S. 332, 343 (2009).

167. There was no petition for review in this case; thus, the Washington State Supreme Court did not consider this particular issue.

168. 186 Wash. App. 148, 344 P.3d 713 (2015).

169. *Id.* at 164, 344 P.3d at 722.

170. *Id.* at 160, 344 P.3d at 719.

171. *Id.* at 160–61, 344 P.3d at 720.

172. *Id.* at 161, 344 P.3d at 720.

173. *Id.* at 162, 344 P.3d at 720.

174. *State v. Valdez*, 167 Wash. 2d 761, 774–75, 224 P.3d 751, 758 (2009).

in her *Brock* dissent.<sup>175</sup> She argued that, by interpreting “the time of arrest” to include “the time of a *Terry* stop that ripens into an arrest,” the majority effectively created “a new exception to the warrant requirement: the search incident to a *Terry* stop.”<sup>176</sup> Justice Gordon McCloud further expressed “fear [that] the majority’s new rule will only invite further expansions of our ‘narrow’ and ‘jealously guarded’ exception to the warrant requirement.”<sup>177</sup> Given the trend in this line of cases, I share that fear.

## CONCLUSION

*Byrd*, *MacDicken*, and *Brock* constitute an increasingly expansive application of *Robinson* that is incompatible with the Fourth Amendment and the “jealously guarded”<sup>178</sup> warrant exceptions under article I, section 7. Rather than carefully considering whether these warrantless searches were justified by their underlying exigencies, the Court broadly applied *Robinson* to encompass any item carried by an arrestee, regardless of whether the arrestee can access the item when it is searched. Moreover, the Court focused on the practical issue of transporting an arrestee’s belongings, elevating that consideration above individual privacy rights. Going forward, the Court should refocus its search incident to arrest jurisprudence on the exception’s established rationales, thus ensuring that the constitutional rights of Washington citizens receive the protection that the Fourth Amendment and article I, section 7 promise.

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175. See *State v. Brock*, 184 Wash. 2d 148, 167–68, 355 P.3d 1118, 1127–28 (2015) (Gordon McCloud, J., dissenting).

176. *Id.* at 168, 355 P.3d at 1128 (quoting *State v. Byrd*, 178 Wash. 2d 611, 623, 310 P.3d 793, 799 (2013)).

177. *Id.* (quoting *Byrd*, 178 Wash. 2d at 623, 310 P.3d at 799).

178. *State v. Ortega*, 177 Wash. 2d 116, 122, 297 P.3d 57, 60 (2013).